

D. Other Standby Charges not Covered. Coverage for standby charges is limited to the conditions outlined above. Standby charges related to any other circumstance are not covered.

(d) Other benefits.

(3) Other covered services and supplies.

(iv) Oxygen.

Statement of Policy

A. Extent of the Home Oxygen Therapy benefit. 1. General.

a. Oxygen and oxygen delivery systems are covered when the patient's ability to breathe is impaired to the degree that home oxygen therapy is medically necessary. The oxygen and equipment for its administration must be prescribed by a physician.

b. Oxygen delivery systems are durable medical equipment and are payable on a rental or lease-purchase basis. Up to a 30-day supply of oxygen at a time is covered. Therefore, the frequency of oxygen purchase should be reasonably related to the patient's oxygen need over a 30-day period, as determined by the physician's prescription.

c. Benefits cannot be expended for spare oxygen supplies kept at a separate location, at an office, summer residence, etc. Such duplicate or spare (for emergency use) supplies of oxygen are excluded.

2. Portable Oxygen System. A portable oxygen system may be covered when necessary to complement the medical needs of a patient who requires a stationary system. A portable oxygen system must be specifically prescribed by a physician whether or not it is part of a stationary system (i.e., included in the system equipment), and the physician's prescription must define circumstances under which the portable system will be used (i.e., the medical purpose to be served by portable oxygen which cannot be met by the stationary system).

3. Exclusions from the Oxygen Benefit. CHAMPUS benefits may not be extended for any of the following:

1. Topical Application of Oxygen. The clinical efficacy of oxygen by topical application has not been established and is still considered investigational. CHAMPUS claims for this service should be denied.

2. Oxygen Treatment of Inner Ear/Carbon Therapy. Payment may not be extended for oxygen (95 percent) and carbon dioxide (5 percent) inhalation therapy for inner ear disease. The

therapeutic benefit derived from this procedure is not established.

3. Preset Oxygen Units. Preset (flow rate not adjustable) portable oxygen units are not covered. A preset unit is primarily designed and meant to be a first-aid item. Its purpose is for use in an emergency and not for long-term therapy.

4. Regulators Greater than Eight Liters per Minute. Regulators that permit a flow rate greater than 8 liters per minute are not appropriate for home use and are not covered.

C. Utilization Guidelines. Any claims that represent an unusual amount of oxygen or more deluxe equipment than is necessary should be referred to the fiscal intermediary's medical review staff.

D. Claims Documentation. 1. The claim must include a signed prescription statement from the attending physician or a consultant specialist who has examined the patient. The prescription must have been written within 30 days prior to the initial delivery of the oxygen. The following information must be included in the prescription:

a. Diagnosis of the condition requiring the use of oxygen.

b. Oxygen flow rate, frequency and duration of use (e.g., two liters per minute, 10 minutes per hour for 12 hours each day).

c. Estimated length of time oxygen will be required.

d. Method of oxygen delivery (e.g., by mask).

e. Medical purpose of portable oxygen system which cannot be met by stationary system (pertains only to claims where a portable system is prescribed in addition to a stationary system—see paragraph A.2.).

2. Where the initial prescription shows an indefinite or lifetime need for oxygen, a new prescription is required annually.

M. S. Healy,

OSD Federal Register Liaison Officer,
Washington Headquarters Services,
Department of Defense.

April 24, 1980.

(FR Doc. 80-13075 Filed 4-28-80; 8:45 am)

BILLING CODE 3810-70-M

32 CFR Part 286

[DoD Directive 5400.7] ¹

DoD Freedom of Information Act

AGENCY: Office of the Secretary of Defense

¹ Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA. 19120. Attention: Code 301.

ACTION: Final rule.

SUMMARY: This rule is reissued to establish DoD policies and procedures for the implementation of the Freedom of Information Act (5 U.S.C. 552) by the Department of Defense. Specifically, DoD Components handling public requests under the Freedom of Information Act, as amended, are provided guidance for handling public requests and for aiding the public in obtaining records under the Act.

EFFECTIVE DATE: March 24, 1980.

FOR FURTHER INFORMATION CONTACT: Colonel R. Farris, Office of the Assistant Secretary of Defense (Public Affairs), Washington, D.C. 20301, telephone 203-697-4325.

SUPPLEMENTARY INFORMATION: In FR Doc. 67-7604, appearing in the Federal Register on July 4, 1967 (32 FR 9686), the Department of Defense published Part 286 of this title, establishing the policy of the Department of Defense regarding the availability to the public of DoD information and implementing 5 U.S.C. 552. In FR Doc. 75-5181, appearing in the Federal Register on February 26, 1975 (40 FR 8190), the Office of the Secretary of Defense published a revision to this Part, which furnished DoD Components with overall guidance on how they should respond to requests from the public for records under the Freedom of Information Act, as amended, and which described the procedures that the public must follow in requesting records under this part. The following document is an administrative revision of Part 286.

Accordingly, 32 CFR, Chapter I, is revised to read as follows:

PART 286—DoD FREEDOM OF INFORMATION ACT PROGRAM

Sec.

286.1 Reissuance and Purpose.

286.2 Applicability and Scope.

286.3 Policy.

286.4 Responsibilities.

286.5 Information Requirements.

Enclosure 1 Definitions.

Enclosure 2 For Official Use Only.

Enclosure 3 Release Procedures.

Enclosure 4 Fee Schedule.

Enclosure 5 Exemptions.

Enclosure 6 Reporting Requirements.

Authority: 5 U.S.C. 552.

§ 286.1 Reissuance and Purpose.

(a) This Rule reissues this Part 286; establishes policies and procedures for the implementation of the DoD Freedom of Information Act (FOIA) Program, Title 5, U.S.C., Section 552; and delegates authorities and responsibilities for the effective administration of the program.

(b) This Part also authorizes, in accordance with DoD Directive 5025.1¹, "Department of Defense Directives System," November 18, 1977, the publication of DoD 5400.7-R, the single DoD regulation on the FOIA Program.

§ 286.2 Applicability and Scope.

(a) The provisions of this part apply to the Office of the Secretary of Defense (OSD) and their administrative support agencies, the Military Departments, the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, the Defense Communications Agency, Defense Contract Audit Agency, Defense Intelligence Agency, Defense Investigative Service, Defense Logistics Agency, Defense Mapping Agency, and the Defense Nuclear Agency (hereafter referred to as "DoD Components").

(b) The National Security Agency records are subject to the provisions of this part unless the records are exempt under Pub. L. 86-36, "National Security Information Exemption".

§ 286.3 Policy.

It is the policy of the Department of Defense to:

(a) Promote public trust by making the maximum amount of information available to the public on the operation and activities of the Department of Defense, consistent with DoD's responsibility to ensure national security.

(b) Allow a requester to obtain records from the Department of Defense that are available through other public information services without invoking the FOIA.

(c) Make available, under the procedures established by enclosures 2, 3, and 4, those records that are requested by a member of the general public who cites the FOIA.

(d) Answer promptly all other requests for information, records, objects, and articles under established procedures and practices.

(e) Release records to the public, unless those records are exempt from mandatory disclosure as outlined in enclosure 5.

(f) Process requests by individuals for access to records about themselves under the Privacy Act procedures as implemented by 32 CFR Part 286a or procedures outlined in this part when they are more advantageous to the requester.

§ 286.4 Responsibilities.

(a) The Assistant Secretary of Defense (Public Affairs) (ASD(PA)) shall:

(1) Direct and administer the DoD FOIA Program to ensure compliance with policies and procedures that govern the administration of the program.

(2) Issue a DoD FOIA regulation and other discretionary instructions and guidance to ensure timely and reasonably uniform implementation of the FOIA in the Department of Defense.

(3) Administer internally the FOIA Program for the OSD, the OJCS and, as an exception to DoD Directive 5100.3,¹ "Support of the Headquarters of Unified, Specified and Subordinate Joint Commands," March 17, 1980, the Unified Commands (the Specified Commands remain under the Military Departments for FOIA matters).

(4) As the designee of the Secretary of Defense, serve as the sole appellate authority for appeals to decisions of respective Initial Denial Authorities identified in ASD(PA) supplementing instructions.

(b) The General Counsel of the Department of Defense shall provide uniformity in the legal interpretation of this part.

(c) Heads of DoD Components shall:

(1) Publish in the Federal Register any instructions necessary for the internal administration of this part within a DoD Component that are not prescribed by this part or by other issuances of the ASD(PA). For the guidance of the public, the information specified in 5 U.S.C. 552(a)(1) will be published in accordance with 32 CFR Part 296.

(2) Conduct training on the provisions of this part for officials and employees who implement the FOIA.

(3) Submit the reports prescribed in enclosure 6 of this part.

(4) Make available for public inspection and copying in an appropriate facility or facilities, in accordance with rules published in the Federal Register, the records specified in 5 U.S.C. 552(a)(2) unless such records are published and copies are offered for sale.

(5) Maintain and make available for public inspection and copying current indices of these records.

§ 286.5 Information requirements.

The reporting requirements in section B of enclosure 6 have been assigned Report Control Symbol DD-PA(TRA&A) 1365.

Enclosure 1—Definitions

A. *FOIA Request*. A written request for DoD records made by a member of the public who either explicitly or implicitly invokes the FOIA (5 U.S.C.

552) this part, or DoD Component supplementing regulations.

B. *Record*. 1. The products of data compilation, regardless of physical form or characteristics, made or received by a DoD Component in connection with the transaction of public business and preserved by a DoD Component primarily as evidence of the organization, policies, functions, decisions, or procedures of the DoD Component.

2. The following are not included within the definition of the word "record":

a. Library and museum material made, acquired, and preserved solely for reference or exhibition.

b. Objects or articles, such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, and equipment, whatever their historical value, or value as evidence.

c. Exploitable resources, including but not necessarily limited to, formulae, designs, drawings, maps and charts, map compilation manuscripts and map research materials, research data, computer programs, and technical data packages. Materials such as these are considered to be exploitable resources because of their development costs, utilization, or intrinsic value, and because they are not utilized as primary sources of information about organization, policies, functions, decisions, or procedures of a DoD Component.

d. Unaltered publications and processed documents such as regulations, manuals, maps, charts, and related geophysical materials that are available to the public through an established distribution system with or without charges.

e. Anything that is not a tangible or documentary record, such as, an individual's memory or oral communication.

3. A record must exist at the time of the request to be considered subject to this Directive. There is no obligation to create or compile a record to satisfy a FOIA request.

C. *DoD Component*. An element of the Department of Defense authorized to receive and act independently on FOIA requests. A DoD Component has its own Initial Denial Authority or Authorities and its own Appellate Authority.

D. *Initial Denial Authority (IDA)*. An official who has been granted authority by the head of a DoD Component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure.

E. *Appellate Authority*. The head of the DoD Component having jurisdiction

¹ See footnote 1, p. 28323.

over the record or the DoD Component head's designee for this purpose.

F. Administrative Appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority of a DoD Component to reverse an IDA decision, to withhold all or part of a requested record, or to deny a request for waiver or reduction of fees.

Enclosures 2—for Official Use Only

A. General. 1. Information that has not been given a security classification under the criteria of an executive order, but that may be withheld from the public for one or more of the reasons cited in FOIA Exemptions 2 through 9, may be considered for official use only. *No other material shall be considered or marked "For Official Use Only" (FOUO), and FOUO is not authorized as an anemic form of classification to protect national security interest.*

2. The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply and whether a significant and legitimate Government purpose is served by withholding the record or portions of it.

3. Records such as notes, working papers, and drafts retained as historical evidence of DoD Component actions enjoy no special status apart from their exemptions under the FOIA (5 U.S.C. 552).

4. The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings, however, will not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

5. Information in a technical document that requires a distribution statement under DoD Directive 5200.20¹, "Distribution Statements on Technical Documents," September 24, 1970 shall bear that statement and shall not be marked FOUO.

R. Marking. 1. An unclassified document containing FOUO information shall be marked "For Official Use Only" at the bottom on the outside of the front cover (if any), on the first page, on the back page, and on the outside of the back cover (if any).

2. Within a classified or unclassified document, an individual page that contains:

a. Both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on that page.

b. FOUO information but no classified information shall be marked "For Official Use Only" at the bottom of the page.

3. Other information media, such as photographs, films, tapes, slides, shall be marked "For Official Use Only" or "FOUO" in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

4. FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information Exempt From Mandatory Disclosure under the FOIA Exemptions * * * apply.

C. Dissemination and Transmission.

1. Until FOUO status is terminated, the release and transmission instructions that follow apply.

2. FOUO information may be disseminated within DoD Components and between officials of DoD Components and Defense contractors and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents should call attention to the presence of FOUO attachments.

3. DoD holders of FOUO information are authorized to convey such information to officials in other departments and agencies of the executive and judicial branches when the information carries out a Government function, provided the information is not protected under the Privacy Act or qualified for disclosure to the other agency under the provisions of that Act. Records thus transmitted shall be marked "For Official Use Only", and the recipient shall be advised that the information has been exempted from public disclosure under the FOIA and under any other special handling instructions.

4. Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4¹, "Provision of Information to Congress," January 30,

1978. Release to the General Accounting Office (GAO) is governed by DoD Directive 7650.1¹, "General Accounting Office Comprehensive Audits," July 9, 1958. Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the receipt may be requested, without marking the record, to protect against its public disclosure for reasons that are explained.

5. Records containing FOUO information shall be transported in a manner that precludes disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO directives or testing materials, which otherwise qualify under postal regulations, may be sent by fourth-class mail.

6. Each part of electrically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation "FOUO" before the beginning of the text. Such messages shall be transmitted in accordance with communications security procedures in ACP-121 (US Supp 1) for FOUO information.

D. Safeguarding. 1. During normal working hours, records determined to be FOUO shall not be left unattended in work areas accessible to unofficial personnel, but shall be placed in an out-of-sight location.

2. At the close of business, FOUO records shall be stored to preclude unauthorized access. Filing such material with other unclassified records in unlocked files, desks, or similar containers is adequate when normal U.S. Government or Government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles such as file cabinets, desks, or bookcases.

E. Termination. The originator or other competent authority, such as appellate authority, shall terminate "For Official Use Only" markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When

¹ See footnote 1, p. 28323.

¹ See footnote 1, p. 28323.

FOUO status is terminated, all known holders shall be notified, if practical. Upon notification, holders should efface or remove the "For Official Use Only" markings. But records in file or storage need not be retrieved solely for that purpose.

F. Disposal. 1. Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to preclude reconstructing and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods, but must give due consideration to the additional expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

2. Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established by 44 U.S.C. Chapter 33.

G. Unauthorized Disclosure. The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. However, appropriate administrative action shall be taken to fix responsibility for unauthorized disclosure to the extent feasible, and appropriate disciplinary action shall be taken. Unauthorized disclosure of FOUO information that is protected by the Privacy Act may also result in criminal sanctions against responsible persons. The DoD Component that originated the FOUO information shall be informed of its unauthorized disclosure.

Enclosure 3—Release Procedures

A. General. Since the policy of the Department of Defense is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for a DoD record made under the Freedom of Information Act may be denied only when:

1. The record is subject to one or more of the exemptions in enclosure 5 of this part, and a significant and legitimate Government purpose is served by withholding it.
2. The record cannot be found because it has not been described well enough to enable the DoD Component to locate it with a reasonable amount of effort by an employee familiar with the files.
3. The applicant has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee, imposed by the instructions of the DoD Component concerned. When personally

identifiable information in a record is requested by the subject of the record or his or her attorney, notarization of the request may be required.

B. Initial Determinations. 1. The initial determination of whether to make a record available upon request may be made by any suitable official designated by the DoD Component in published regulations. The marking or absence of the marking "For Official Use Only" does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under this Directive is applicable.

2. The officials designated by DoD Components to make initial determinations should consult with public affairs officers (PAOs) to become familiar with subject matter that is considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action will be challenged in the media.

3. Initial determinations on whether to release a record:

a. These shall normally be made and a decision reported to the requester within 10 working days of the date a request is received by the official designated to respond to the type of record sought, provided the requester indicates a willingness to reimburse the DoD Component for any search and duplication costs incurred. If the willingness of the requester to reimburse the DoD Component for any required search and duplication costs is not expressed in the request, and the costs are likely to be substantial, resolution of this issue is appropriate before the time for responding begins to run.

b. Misdirected requests will be forwarded promptly to the DoD Component with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester will not begin until the request is received by the DoD Component that manages the records requested.

c. When a decision is made to release a record, a copy shall be forwarded promptly to the requester upon receipt of any required fees, or the requester may be directed to another source to obtain the record, such as the U.S. Government Printing Office.

d. When a request is received for a record that was obtained from a non-U.S. Government source, or for a record that contains information from a non-U.S. Government source, the source of the record or information will be

promptly notified and afforded reasonable time to present any objections concerning the release. These objections will be evaluated, and where a substantial issue has been raised, the DoD Component may seek additional information from the source of the information and shall afford the source and requester reasonable opportunities to present their arguments on the legal issues involved prior to making an agency determination. When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the requester will be notified and action on the request normally will not be taken until after the outcome of that court action is known.

e. When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

f. In unusual circumstances when additional time is needed to respond, the DoD Component shall acknowledge the request in writing within the 10-day period, describe the circumstances requiring the delay, and indicate the anticipated date for substantive response that may not exceed 10 additional working days. Unusual circumstances that may justify delay are:

(1) The requested record is located in whole or in part at places other than the office processing the request.

(2) The request requires the collection and coordination of a substantial number of records.

(3) Consultation is required with other DoD Components or agencies having substantial interest in the subject matter to determine whether the records requested in whole or in part are exempt from disclosure under provisions of this part or should be released as a matter of discretion.

4. The extension of time for responding to an initial request must be approved on a case-by-case basis by the final appellate authority for the DoD Component or in accordance with regulations of the DoD Component that establish guidance governing the circumstances in which such extensions may be granted.

5. When a request for a record or records is denied in whole or in part, the designated official who has made that determination shall explain to the requester in writing the basis for the determination and the opportunity and procedures for appealing that determination to the appellate authority.

a. Inability to process any part of the request within the specified time should be explained to the requester, with

notification that he or she may treat this delay as an initial denial with a right to appeal or may agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made.

b. The explanation of the substantive basis for a denial shall include both specific citation of the statutory exemption applied under provisions of this Directive and a discussion of the significant and legitimate Government purpose served by invoking an exemption. Merely referring to a classification or "For Official Use Only" marking on the requested record does not constitute a proper citation or explanation of the basis for invoking an exemption.

c. The name and title or name and position of the official responsible for the denial shall be included in the written response to the requester.

d. When the initial denial is based in whole or in part on a security classification, the explanation shall include a reference to the criteria of the executive order on which the classification is based, together with a brief explanation to demonstrate to the extent consistent with security considerations, the logical relationship between the content of the requested record and the criteria.

e. Copies of all initial denials shall be maintained by each DoD Component in a form suitable for rapid retrieval, periodic statistical compilation, and management evaluation.

6. If the official designated by the DoD Component to make initial determinations on requests for records declines to provide a record because the official considers it exempt and its withholding justified for a significant and legitimate Government purpose, that decision may be appealed by the requester in writing to the head of the DoD Component who has jurisdiction over the record. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. In addition, the DoD Component may impose a reasonable time limit that may not be less than 40 days for the requester to file an appeal.

C. Appeal Determinations. 1. Final determination on appeals shall normally be made within 20 working days of the receipt of the appeal by the official designated to make the decision. Appeals misdirected by the requester will be forwarded promptly to the proper appellate authority with the period for response beginning upon

receipt by the appellate authority. If additional time is needed to decide the appeal because of unusual circumstances, as described in paragraph B.3.f. of this enclosure, the final determination may be delayed for the number of working days, not to exceed 10, which were not used as additional time for responding to the initial request.

2. Final refusal to provide a requested record must be made in writing by the head of the DoD Component who has jurisdiction over the record. Such a refusal shall be made in accordance with appeal procedures prescribed in regulations that shall include, as a minimum, the following elements:

a. The basis for the refusal shall be explained to the requester, in writing, both with regard to the applicable statutory exemption invoked under provisions of this part and the significant and legitimate Government purpose served by its withholding.

b. When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing executive order and that this determination is based on a declassification review, with the explanation of why that review confirmed the continuing validity of the security classification.

c. The written final denial shall include the name and title or name and position of the official responsible for the denial and of the provision for judicial review of the denial as defined in section D., below.

d. Final refusal ordinarily should not be made without prior consultation with the Office of the Staff Judge Advocate, General Counsel, or other counsel of the Component.

e. Copies of all final denial letters shall be maintained by each DoD Component in a central repository.

D. Judicial Action. A requester may bring suit to compel release of a record in the United States District Court (1) in the district in which the requester resides or has a principal place of business; (2) in the district in which the requested records are located; or (3) in the District of Columbia when administrative remedy has been exhausted. Administrative remedy is exhausted when the requester has been denied a record by an appellate authority or when the DoD Component has failed to respond within the time limits prescribed by the FOIA.

E. Cost for Records. The costs of searching for and duplicating a requested record must be paid or waived in accordance with enclosure 4.

F. Time Limits. 1. The time limits for responding to requests begin upon receipt from the requester of clear evidence of willingness to pay anticipated search and duplication costs under the schedule of fees in enclosure 7. The record need not be forwarded until receipt of payment.

2. The time limits for responding to requests for records are subject to the conditions set forth in the previous paragraphs, as follows:

- a. Initial Responses—10 working days.
- b. Appeal of Denial—20 working days.
- c. Extension of time available under certain circumstances for either the initial or final determination, but not both—10 working days.

Enclosure 4—Fee Schedule

A. Introduction. The fees described in this enclosure apply to FOIA requests. They reflect direct search and duplication costs, recovery of which are permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business nor are they meant as a substitute for any other schedule of fees, such as 32 CFR Part 288.

B. Fee Assessment. 1. Minimum fees will not be charged.

2. When direct search and duplication costs for a single FOIA request total less than \$30.00, fees should be waived automatically. The DoD Components, however, may set aside the automatic waiver provision when on the basis of good evidence, the Component can demonstrate that waiver of fees is not in the public interest.

3. Decision to waive or reduce fees that exceed the automatic waiver threshold should be made on a case-by-case basis. As a general guide, fees ordinarily will be waived when any of the following circumstances are met:

a. No record is located or all records are denied. However, fee charges are appropriate if the requester insists upon a search and evaluation and agrees to such fees after being informed that the search is likely to be nonproductive or that the records are all likely to be exempt from release.

b. A record is voluntarily created to preclude an otherwise burdensome effort to provide voluminous amounts of available records including additional information not requested.

c. The record is for the Public Information News Media.

d. The record is for a nonprofit public interest group and the subject of the requested record is known to be of wide public interest, and it is reasonable to expect that the DoD Component will later make the information available to

a significant segment of the general public.

e. A previous denial is reversed in whole or in part.

4. **Collection of Fees.** Normally, collection of charges and fees will be made in advance of rendering the service. In some instances, it may be more practical to collect charges and fees at the time of conveying the service or property to the recipient, but only in those instances where the request specifically states that the cost involved will be acceptable or acceptable up to a specified limit that covers anticipated costs.

5. **Application.** The fee schedule contained in this enclosure is used to compute direct search and duplication costs associated with processing a given FOIA request. Such fees will be computed based on time actually spent. Neither time-based nor dollar-based minimum charges for search and duplication are authorized.

6. Search Fees. a. Manual Search

Type	Grade	Hourly rate*
Clerical	E3/GS8 and below	8
Executive	07/GS16/ES4 and above	26
Professional	All other	18

*In dollars.

b. Computer search will be based on direct cost of the central processing unit, input output devices, and memory capacity of the actual computer configuration.

c. Actual cost of transporting records or personnel to the search site may be included.

7. Duplication Fees

Type	Cost per page*
Office copy	10
Microfiche	25
Printed material	01

*In dollars.

8. **Audiovisual Documentary Material.** Search costs are computed as for any other record. Duplication cost is the actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality.

9. **Other Records.** Direct search and duplication cost for any record not described above will be computed in the manner described for audiovisual documentary material.

Enclosure 5—Exemptions

A. **General.** 1. Records that meet the exemption criteria in this enclosure may

be withheld from public disclosure and need not be published in the Federal Register, made available in a library reading room, or provided in response to a FOIA request.

2. An exempt record, however, should be made available upon the request of any member of the public when, in the judgment of the releasing DoD Component or higher authority, no significant and legitimate Government purpose would be served by withholding it under an applicable exemption. If a DoD Component determines that information requested under the FOIA meets the Exemption 4 withholding criteria set forth below, absent compelling public interest in support of release, the Component will not ordinarily exercise its discretionary power.

B. **Exemptions.** The following types of records may be withheld in whole or in part from public disclosure unless otherwise prescribed by law.

Number 1. Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by executive order and implemented by regulations, such as DoD 5200.1-R, "DoD Information Security Program Regulation," December 1978.

Number 2. Those containing or constituting rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules or practices of a DoD Component if their publication or inspection would not directly affect the general public, or their release to the public would substantially hinder the effective performance of a significant function of the Department of Defense. Examples include:

a. Those operating rules, guidelines and manuals for DoD investigators, inspectors, auditors, or examiners that must remain privileged in order for the Component to fulfill a legal requirement.

b. Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance to duty, advancement, or promotion.

Number 3. Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. Examples of statutes are:

a. National Security Agency Information Exemption, Pub. L. 88-36, Section 6.

b. Patent Secrecy, 35 U.S.C. 181-188.

Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

c. Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162.

d. Communication Intelligence, 18 U.S.C. 798.

Number 4. Those containing trade secrets or commercial or financial information that a DoD Component receives from a person outside the Government with the understanding that they will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Examples include records which contain:

a. Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions and discoveries, or other proprietary data.

b. Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

c. Personal statements given in the course of inspections, investigations, or audits, where such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

d. Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to prevailing rate employees within the Department of Defense.

Number 5. Except as provided in subsections b. through e., below, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 551) or within or among DoD Components.

a. Examples include:

(1) The nonfactual portions of staff papers, to include after action reports and situation reports containing staff advice, opinions or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of the Department of Defense by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(3) Those nonfactual portions of evaluations by DoD Component personnel or contractors and their products that contain recommendations or advice by Government employees about the contractor or product.

(4) Advance information of a speculative, tentative, or evaluative nature on such matters as proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate Government functions.

(5) Records that are exchanged between agency personnel and within and among DoD Components or agencies as part of the preparation for anticipated administrative proceedings by an agency or litigation before any federal, state or military court.

(6) Those portions of official reports of inspection, audits, investigations or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

b. If any such intra or interagency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the agency, i.e., the process by which litigants obtain information from each other that is relevant to the issues in a trial or hearing, then it should not be withheld from the general public even though discovery has not been sought in actual litigation. If, however, the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of a litigant balanced against the interests of the agency in maintaining its confidentiality, then the record or document need not be made available to a member of the general public.

c. Intra or interagency memoranda or letters that are factual or those reasonably segregable portions that are

factual are routinely made available through discovery and should be made available to a requester unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative or so redundant of information already available to the requester so as to provide no new substantive information.

d. A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decisionmaking process.

e. An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is incorporated by reference, explicitly or implicitly, in the record containing that decision.

Number 6. Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a member of the public, would result in a clearly unwarranted invasion of personal privacy.

a. Examples of other files containing personal information similar to that contained in personnel and medical files include:

(1) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(2) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

b. In determining whether the release of information would result in a "clearly unwarranted invasion of personal privacy," consideration should be given to the stated or ascertained purpose of the request. When determining whether a release is "clearly unwarranted," the public interest in satisfying this purpose must be balanced against the sensitivity of the privacy interest being threatened. This exemption shall not be exercised in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family.

c. An individual's personnel, medical, or similar file may be withheld from him or his designated legal representative

only to the extent consistent with 32 CFR Part 286a.

d. A clearly unwarranted invasion of the privacy of others identified in that record may constitute a basis for deleting reasonably segregable portions of a record even when providing it to the subject of the record.

Number 7. Those investigative records compiled for the purpose of enforcing civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law.

a. This exemption applies, however, only to the extent that release of a record or portion of a record would:

(1) Interfere with enforcement proceedings.

(2) Deprive a person of the right to a fair trial or to an impartial adjudication.

(3) Constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record.

(4) Disclose the identity of a confidential source.

(5) Disclose confidential information furnished only from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

(6) Disclose investigative techniques and procedures not already in the public domain and requiring protection against public disclosure to ensure their effectiveness.

(7) Endanger the life, physical safety, or well-being of law enforcement personnel or their families.

b. Examples include:

(1) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related Government litigation or adjudicative proceedings.

(2) The identity of firms or individuals being investigated for alleged irregularities involving contracting with Department of Defense when no indictment has been obtained or any civil action filed against them by the United States.

(3) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized agency or office within a DoD Component. National security intelligence investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

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c. The right of individual litigants to investigative records currently available by law (such as, the Jencks Statute, 18 U.S.C. 3500) is not diminished.

d. When the subject of an investigative record is the requester of that record, it may be withheld as authorized by 32 CFR Part 286a.

Number 8. Those contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

Number 9. Those containing geological and geophysical information and data (including maps) concerning wells.

Enclosure 8—Reporting Requirements

A. General. The FOIA requires that certain information be reported each year to Congress. This reporting requirement shall be accomplished through consolidation of DoD Component reports and transmitted to the Speaker of the House of Representatives and the President of the Senate by the Office of the Secretary of Defense.

B. Component Annual Reporting Requirement. Each DoD Component shall prepare statistics and accumulate paperwork for the preceding calendar year on those items prescribed below and submit them in duplicate to the ASD(PA) on or before February 1 annually.

C. Annual Report Content. The annual report shall contain the following:

1. Item 1. Report the number of public requests (a single FOIA request) completed. Report the number of reportable requests, the number in which a statutory exemption was invoked, and the number in which some other authority resulted in the requester not receiving that which was requested.

Note.—A reportable request is that portion of a FOIA request resulting in a single record or group of records pertaining to one general subject area being acted upon by one IDA who concludes that a single type of determination applies. Example: A single public request that requires the action of three IDAs in determining if a record under their jurisdiction is to be released would be counted as three reportable requests, but one public request. Records released by two IDAs in response to one public request would be counted as two reportable requests.

2. Item 2. Provide statistics on the specific authorities—statutory exemptions, statutes, and categories of other reasons used in the totals above.

a. Item 2(a). Show the number of times each of the nine statutory exemptions (enclosure 5) was invoked (the total may not agree with Item 1 because of

situations were two or more exemptions were cited for one record).

b. Item 2(b). List the statutes cited when invoking Exemption 3 and the number of times each was cited.

c. Item 2(c). Show the number of times each category of other reasons was cited in response to the public. Five such reportable categories have been established in enclosure 7 (the total will equal the number reported in Item 1).

3. Item 3. Provide the number of IDAs authorized. Then list the names and titles or positions of persons cited as IDAs, followed thereafter in two subcolumns by the number of times each person cited exemptions or other authority categories (the vertical columnar totals must match Item 1).

4. Item 4. Provide the number of appeals that, upon review, were granted, granted in part, or denied, followed by a total of those three numbers.

5. Item 5. Repeat the three statistical requirements of Item 2 for the appeals that were granted in part or denied.

6. Item 6. Repeat Item 3 for appellate authorities including both subcolumnar statistics.

7. Item 7. When a court determines that DoD Component records were improperly withheld and issues a finding raising questions on the actions of DoD Component personnel, provide a copy of each such court opinion or order; a copy of the Office of Personnel Management finding and recommendation on each such proceeding; and a report of the disciplinary action taken against the person who is primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken.

8. Item 8. List changes or revisions of DoD Component rules or regulations affecting the implementation of FOIA followed by the Federal Register reference (number, date, and page) that announced the change or revision to the public. Append a copy of each to the report.

9. Item 9. The amount of fees collected from the public will be reported tri-annually to OASD(PA); thus, duplicate annual reporting by DoD Components is not required.

10. Item 10. The following subitems have been established by congressional request as indicative of DoD Component efforts to administer FOIA.

a. Item 10(a). List all new categories of records now being released in whole or in part under FOIA.

b. Item 10(b). The costs of administering the FOIA Program shall be reported tri-annually to OASD(PA); thus, duplicate annual reporting by Components is not required. The tri-annual reports shall be used by the

OASD(PA) to portray annual DoD Component and DoD-wide totals.

c. Item 10(c). Report the number of times unusual circumstances required an extension of normal processing time limits, and break down that total by circumstances and by court action. Append to your report a copy of each court opinion or order involving the question of time limits for processing.

d. Item 10(d). Append a copy of all unpublished (not announced in the Federal Register) instructions to DoD Component personnel, memoranda, or other issuances that address procedures, definitions, or interpretations of the FOIA promulgated during the year at any organizational level of the DoD Component. Report the number of documents provided and whether or not they are publicly available, together with the legal basis for nondisclosure, should that be the case.

e. Item 10(e). Any other information, opinions, or recommendations considered pertinent by the DoD Component.

11. Item 11. Report descriptions of FOIA instructional and educational efforts undertaken by the DoD Component directed toward DoD Component personnel or the public.

D. Tri-Annual Report. 1. A portion of the annual reporting requirement has been selected for more frequent reporting to provide management data at intermediate DoD Component and DoD levels. The data selected fall into three areas: (1) costs attendant to administration of the FOIA Program, (2) the amount collected from the public, and (3) the number of reportable requests and appeals.

2. Each DoD Component shall prepare statistics tri-annually (Jan-Apr, May-Aug, Sep-Dec) and, using the outline below, report these data to the ASD(PA) on or before 30 days after the close of each 4-month reporting period. The use of DD Form 2086, "Record of FOI Case Processing Costs," to maintain a record of the cost of each FOIA case will provide the data base needed for compiling the data in this report.

E. Tri-Annual Report Outline

Reporting Activity:

Period of Report:

1. Cost of Routine Requests Processed:

No. of reportable requests x (cost factor per request) = \$

2. Personnel Costs (Civilian and Military):

a. Direct costs of personnel assigned FOI duties based upon estimated payroll workyears by grade:

Cost: \$

b. Direct costs for other personnel involved in processing requests not included above base upon accumulation of total hourly data:

(1) Search Time Costs: \$

- (2) Review and Excising: _____
 (3) Coordination and Approval/Denial
 Decision Costs: _____
 (4) Correspondence and Form
 Preparation: _____
 (5) Other Activity Costs: _____
 Total Manhour Costs: \$ _____
 c. Application of Overhead:
 (Subtotal a) + (Subtotal b) ×
 (overhead rate): \$ _____
 Total of Direct Personnel Costs and
 Overhead: \$ _____
 3. Other Case Related Costs:
- | | |
|-----------------------------|----------|
| a. Computer | \$ _____ |
| b. Office Copy Reproduction | \$ _____ |
| c. Microfiche Reproduction | \$ _____ |
| d. Cost of Printed Records | \$ _____ |
| Total of Other Costs: | \$ _____ |
4. Other Operating Costs:
 a. Reporting Costs²
 (1) Operational _____
 (2) User _____
 (3) Overhead ((1) + (2) × (overhead
 rate)) _____
 \$ _____
 b. Other costs as directed or as can be
 reasonably ascertained. Itemize each
 expense category and cost.
 \$ _____
 (Subtotal a.) + (Subtotal b.)

5. Summary:
 a. Total Costs of Sections 1 through 4
 above \$ _____
 b. Amount Collected from Requesters this
 Reporting Period:
 Search _____ Copy _____ Total: \$ _____
 c. No. of Requests Processed During this
 Reporting Period: Reportable Requests _____
 Appeals _____ Total: _____

Enclosure 7—Other Reason Categories

1. *Transferred Request* This category applies when responsibility for making a determination or a decision on categories 2, 3, or 4 below is shifted from one DoD Component to another.

2. *Lack of Records* This category covers situations wherein the requester is advised the DoD Component has no record or has no statutory obligation to create a record.

3. *Failure of Requester to Reasonably Describe Record* This category is specifically based on 5 U.S.C. 552(a)(3)(A)

4. *Other Failures by Requester to Comply with Published Rules or Directives* This category is based on 5 U.S.C. 552(a)(3)(B) and includes instances of failure to follow published rules concerning time, place, fees, and procedures.

5. *Request Withdrawn by Requester* This category covers situations when the requester asks an agency to

disregard the request or appeal or pursues the request outside FOIA channels.

April 23, 1980.

M. S. Healy,
*OSD Federal Register Liaison Officer,
 Washington Headquarters Services,
 Department of Defense.*

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BILLING CODE 3810-70-M

POSTAL SERVICE

39 CFR Part 111

Merchandise Return Service; Temporary Implementing Regulations

AGENCY: Postal Service.

ACTION: Temporary implementing regulations.

SUMMARY: By separate notice published on April 17, 1980 (45 FR 26194), the Postal Service announced the establishment of a temporary mail classification for merchandise return service under the authority of 39 U.S.C. 3641(e). The change becomes effective at 12:01 AM on April 27, 1980.

In order to fully implement that mail classification change, the Postal Service also adopts a new temporary Part 919 of the Domestic Mail Manual, effective April 27, 1980.

EFFECTIVE DATE: April 27, 1980.

FOR FURTHER INFORMATION CONTACT:
 Grayson Poats, (202) 245-4602.

SUPPLEMENTARY INFORMATION: The purpose of the merchandise return service is to offer a means by which a parcel can be returned to a shipper with postage paid by the shipper. In order to make this service available to mailers, implementing regulations must be made effective at the same time the service becomes effective, April 27, 1980.

Although exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553 (b), (c)) regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service ordinarily invites comments from the public whenever it proposes a new regulation such as this, which might have a substantial effect on the public. In this case, however, publishing these rules as proposals, with a comment period of 30 days, would delay implementation of this new service to the disadvantage of mailers who might otherwise utilize it.

We note also that on April 21, 1980, the Postal Rate Commission transmitted to the Governors a recommended decision approving the settlement proposal under which the temporary merchandise return service was

established. It is anticipated that the Governors will consider the recommended decision at the next meeting of the Board, scheduled for May 6, 1980, and if that decision is approved, these implementing regulations will be made permanent.

Accordingly, the Postal Service finds it unnecessary and contrary to the public interest to follow its customary practice of publishing these rules as proposed rules before they become effective. See 5 U.S.C. 553(d).

In view of the considerations discussed above, the Postal Service hereby adopts the following revision of the Domestic Mail Manual, which is incorporated by reference in the Federal Register. See 39 CFR 111.1

(39 U.S.C. 401, 403, 404, 3621, 3623, 3641)

W. Allen Sanders,
*Associate General Counsel for General Law
 and Administration.*

New Part 919 is added reading as follows:

919—Merchandise Return

919.1 Description

.11 *General.* Merchandise return service provides a method whereby a merchandise return permit holder may authorize individuals and organizations to send parcels to the permit holder and have the return postage and fees paid by the permit holder.

.12 *Parcel Eligibility.* Merchandise return service is available for First-Class Mail, and third- and fourth-class mail.

.13 *Delivery of a parcel sent under two-part label procedure.* A zone rated or other parcel bearing a merchandise return label sent under the two-part label procedure will not be sent to postage due units but will be returned to the permit holder through the regular distribution and delivery system as any other parcel.

.14 *Delivery of a parcel sent under one-part label procedure.* A non-zone rated parcel bearing a merchandise return label sent under the one-part label procedure will be sent to postage due units for determination of postage and fees before delivery.

919.2 Merchandise Return Permit

.21 *General.* A permit to use merchandise return service is required at each post office where parcels will be returned. An application on Form 3625, *Merchandise Return Permit Application*, must be submitted at each post office where the mail will be returned. On receipt of the application, the postmaster will complete the permit portion of the form and deliver it to the applicant. A permit is valid for one year.

.22 *Cancellation of Permit.* A permit may be cancelled by the Postal Service

² See DoD Instruction 5000.22, (p. 28323.) "Guide to Estimating Costs of Information Requirements," October 17, 1974. In the report for the last 4-month period (Sep-Dec) of each year, include the costs attributable to the Annual Report.